

CITY COUNCIL CONFERENCE

**MUNICIPAL BUILDING CONFERENCE ROOM
201 WEST GRAY, NORMAN, OK**

DECEMBER 8, 2015

5:00P.M.

- 1. UPDATE OF RECENT DEVELOPMENTS IN SEX DISCRIMINATION JURISPRUDENCE; AND DISCUSSION OF RESOLUTION R-1516-65 REQUESTED BY THE NORMAN HUMAN RIGHTS COMMISSION.**
- 2. UPDATE ON UNIVERSITY NORTH PARK TAX INCREMENT FINANCE DISTRICT.**

(UNP BACKUP MATERIAL WILL BE FORWARDED TO COUNCIL ON MONDAY)

ITEM 1

HUMAN RIGHTS COMMISSION



Office memorandum

Date: December 4, 2015

To: The Honorable Mayor and Councilmembers

Through: Jeff Harley Bryant, City Attorney *JHB*

From: Kristina L. Bell, Assistant City Attorney *KLB*

Subject: Update of recent developments in Sex Discrimination jurisprudence;
Resolution R-1516-65 Requested by the Norman Human Rights
Commission

Background

At the October 26, 2015, meeting of the City of Norman Human Rights Commission ("HRC"), the City Attorney's Office presented a requested legal update of sex discrimination jurisprudence, specifically regarding cases focused on discrimination claims grounded in disparate treatment due to sexual orientation and gender identity. (See attached October 26, 2015, Office Memorandum). The HRC voted unanimously to request that this information be presented to City Council and to encourage City Council to adopt a resolution providing policy clarification regarding the administration of City policies and ordinances as well as the interpretation and enforcement of Chapter 7 of the City's Code of Ordinances in accordance with the information provided.

Troy Stephenson, Executive Director of Freedom Oklahoma, attended the HRC meeting and was supportive of the update and the recommendation from the HRC. Mayor Rosenthal also attended the meeting and concurred that the City Council be briefed on the case law and that a recommendation to provide clarity to the City Ordinances would be timely.

Discussion

In addition to the memorandum that was provided to the HRC, on November 13th, City legal staff had an opportunity to consult with local attorney Don Holladay. Mr. Holladay was involved in litigating a case wherein the Tenth Circuit Court of Appeals held Oklahoma's same-sex marriage ban to be unconstitutional, with certiorari denied by the Supreme Court of the United States ("SCOTUS"). Mr. Holladay had reviewed the Legal Department's memorandum to the HRC, conducted his own independent legal research in this area of the law, and was able to provide additional insights regarding the subject. Mr. Holladay advised that the memorandum was a comprehensive current legal review and added that the Department of Defense ("DOD") also added sexual orientation to the list of nondiscriminatory protections under the military's equal opportunity program in June, 2015.

Mr. Holladay also advised that Norman United, the organization that had requested HRC and the City take action on these issues, expressed a main concern that not all citizens in Norman may receive the same protection depending on their circumstances. For instance, citizens working for the federal government (like postal workers), University of Oklahoma employees whose handbook prohibits sexual

orientation discrimination, and employees of private employers who afford similar protection may receive protection at their jobs in Norman, while other Norman citizens who may work for a smaller private employer that does not meet the 15 employee threshold to be governed by the Equal Employment Opportunity Commission ("EEOC") may not enjoy the same protection. It was expressed that if Norman enforced its Civil Rights ordinance in the same manner as it was being applied by the EEOC, then perhaps there might be an avenue for those employees who could not seek relief from the EEOC to have a remedy under the City Code provision. It was acknowledged that the remedies available in Federal Court under Title VII were significantly broader than Municipal Court criminal penalties that could be levied against a convicted defendant.

Mr. Holladay also noted that although the Tenth Circuit Court of Appeals and SCOTUS have not yet explicitly ruled on whether discrimination based on sexual orientation or gender identity is impermissible sex discrimination, SCOTUS historically has shown a great deal of deference toward EEOC interpretation, saying that the EEOC represents "a body of experience and informed judgment to which courts may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Mr. Holladay also noted that SCOTUS's recent ruling on same-sex marriage provides some insight on how the high court views these types of issues and that he believes future federal cases addressing sexual orientation and gender identity discrimination will be viewed in the context of SCOTUS's most recent ruling that for states to not recognize same-sex marriage is a violation of the 14th Amendment to the U.S. Constitution.

Recommendation

As requested by the HRC, a draft Resolution acknowledging current federal jurisprudence regarding sexual orientation and gender identity as the basis for discrimination claims under Title VII is provided for City Council review. Staff will be available for presentation and to respond to questions at the Council Conference on December 8, 2015.



Date: October 26, 2015

To: Norman Human Rights Commission

Through: Jeff Harley Bryant, City Attorney *JHB*

From: Kristina L. Bell, Assistant City Attorney *KLB*

Subject: Legal Update regarding Sexual Orientation and Gender Identity Protection

I. Background

The following is an analysis of the current law regarding discrimination claims made by Lesbian Gay Bisexual and Transgender ("LGBT") individuals alleging that they were discriminated against based on sexual orientation and/or gender identity. This memorandum addresses President Barack Obama's Executive Order ("EO") addressing federal civilian employees and federal contractors, regulations published by the United States Department of Housing and Urban Development ("HUD"), and guidance and appeal orders issued by the federal Equal Employment Opportunity Commission ("EEOC") as well as a legal analysis of recent federal case law addressing discrimination claims based on sexual orientation and gender identity.

II. Discussion

A. Executive Order 13672

On July 21, 2014, President Obama signed Executive Order ("EO") 13672 prohibiting discrimination on the basis of gender identity in the federal civilian work force and prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity.¹

The stated purpose of EO 13672 is "to provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity." EO 13672 stated that it was "not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."

¹ Proposed federal Congressional legislation prohibiting discrimination in hiring and employment on the basis of sexual orientation or gender identity by employers with at least 15 employees, called The Employment Non-Discrimination Act ("ENDA") has been introduced multiple times since 1994 but has not passed. President Obama has publicly supported the bill.

1. Federal Civilian Employees

President Richard Nixon issued EO 11478 (1969) that originally prohibited discrimination in the competitive service of the federal civilian workforce on the basis of race, color, religion, sex, national origin, handicap, and age. EO 11478 was amended by President Bill Clinton's EO 13087 (1998) adding the protected classification of sexual orientation. EO 13672 added the protected classification of gender identity. This provision went into effect upon the signing of the EO.

2. Federal Contractors

EO 13672 also amended President Lyndon B. Johnson's EO 11246 (1965), which originally prohibited discrimination by federal government contractors and sub-contractors on the basis of race, color, religion, sex, or national origin. EO 13672 added the protected classifications of "sexual orientation" and "gender identity."

The provisions pertaining to federal contractors became effective on April 8, 2015, 120 days after the United States Department of Labor ("DOL") promulgated the Final Rule. It applies to covered contracts entered into or modified on or after April 8, 2015.

B. HUD's Equal Access Rule

HUD adopted the Equal Access Rule ("Rule"), 77 FR 5662, on February 3, 2012. HUD implemented this final rule to implement policy "to ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status." This rule went into effect on March 5, 2012. This Rule was enacted after HUD published a proposed rule on January 24, 2011, which advised of evidence suggesting that LGBT individuals and families did not have equal access to housing. "Such information concerned HUD because HUD is charged with promoting the federal goal of providing decent housing and a suitable living environment for all." HUD noted that many state and local governments shared this concern regarding equal housing opportunities and that 20 states, the District of Columbia, and over 200 localities had enacted laws prohibiting discrimination in housing on the basis of sexual orientation or gender identity. HUD initiated the rulemaking in January, 2011, "in an effort to ensure that HUD's rental housing and homeownership programs remain open to all eligible persons regardless of sexual orientation, gender identity, or marital status."

At the Final Rule stage, new § 5.105(a)(2) was revised to "make explicit that eligibility determinations for HUD-assisted or -insured housing must be made without regard to *actual* or *perceived* sexual orientation, gender identity, or marital status." (emphasis added). Section 5.105(a)(2)(iii) included the

prohibition of inquiries regarding sexual orientation or gender identity for the purpose of determining eligibility or otherwise making housing available but allows inquiries related to an applicant or occupant's sex for the limited purpose of determining placement in temporary, emergency shelters with shared bedrooms or bathrooms, or for determining the number of bedrooms to which a household may be entitled. The Rule also revised and added new definitions:

1. **"Family"** – 24 CFR § 5.403's definition of "family" was slightly reorganized to make clear that "'family' includes but is not limited to the following, regardless of actual or perceived sexual orientation, gender identity, or marital status." This revised language makes explicit that perceived, as well as actual, sexual orientation, gender identity, and marital status cannot be factors for determining eligibility for HUD-assisted housing or FHA-insured housing.

2. **"Gender Identity"** - 24 CFR § 5.403 defines "gender identity" as "actual or perceived gender-related characteristics." This definition was based on the definition of "gender identity" in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249(c)(4), which was enacted in 2009 to protect LGBT individuals from targeted violence. The definition "is intended to cover actual or perceived gender-related characteristics of all persons, including transgender persons," so HUD "will interpret it to include those gender-related characteristics not stereotypically associated with a person's designated sex at birth."

3. **"Sexual Orientation"** – 24 CFR § 5.403 defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality." This definition is based on federal policy provided by the Office of Personnel Management ("OPM") in its publication, "Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights," which was written "to implement the Federal Government's commitment to equal employment opportunity for LGBT individuals in the federal civil service." Like gender identity, the Rule covers both perceived and actual sexual orientation. The rule therefore covers situations in which an applicant identifies as transgender; is perceived as transgender, multi-gendered, or between genders; or who has had a history of same-sex relationships.

Although the Rule adds these additional program requirements, it "does not create additional protected classes in existing civil rights laws such as the Fair Housing Act, . . . which [explicitly] prohibits discrimination based on race, color, national origin, religion, sex, disability, and familial status." HUD acknowledges, however, that even though sexual orientation and gender identity are expressly identified protected classes in the Fair Housing Act ("FHA"), the FHA's "prohibition of discrimination on the basis of sex prohibits discrimination against LGBT persons in certain circumstances, such as those involving nonconformity with gender stereotypes." HUD also may "have jurisdiction to process a complaint filed under the [FHA] if an LGBT person obtains housing but then experiences discrimination in the form of sexual harassment." Sexual

harassment under the FHA is illegal “if the conduct is motivated by sex and is either so severe and pervasive that it creates a hostile environment or the provision of housing or its benefits is conditioned on the receipt of sexual favors (for example, as a *quid pro quo*).” HUD acknowledges that harassment may also be motivated by sex if it is due to “a landlord’s view that the tenant’s appearance or mannerisms fail to conform with stereotypical expectations of how a man or woman should look or act.”

In HUD’s Affirmatively Furthering Fair Housing Rule (“AFFH”), 80 FR 42284, promulgated on July 16, 2015, HUD confirmed its “policy to ensure equal access [to housing] on the basis of sexual orientation, gender identity, and marital status” by referring to its 2012 Equal Access Rule. HUD reiterated that the Equal Access Rule “did not and could not, . . . expand statutory fair housing protections to all persons on the bases [of sexual orientation and gender identity], but noted again that the FHA’s prohibition of discrimination based on sex “prohibit[ed] discrimination against LGBT individuals in certain circumstances, such as those involving nonconformity with gender stereotypes.”

C. EEOC Interpretation

The EEOC is the federal agency charged with the enforcement of federal laws prohibiting unlawful discrimination by federal government agencies and by private employers with more than 15 employees. The EEOC adopted a Strategic Enforcement Plan (“SEP”) in December, 2012, that listed “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” as an enforcement priority for the FY2013-2016 and has actively filed lawsuits² on behalf of transgender employees, filed amicus briefs related to coverage of sexual orientation and transgender status, and has issued federal sector administrative decisions in these areas. The EEOC enforces federal laws that make it illegal to discriminate against a job applicant or employee because of the person’s race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. Federal law also prohibits retaliation by employers against employees who oppose discriminatory employment practices. Title VII prohibits an employer from “discriminat[ing] against any individual with respect to his compensation, terms,

² In *EEOC v. Lakeland Eye Clinic, P.A.*, Civ. No. 8:14-cv-2421-T35 AEP, filed on Sept. 25, 2014, in the Middle District of Florida, the EEOC sued an organization of health care professionals, alleging that it discriminated based on sex by firing an employee who was transgender. On April 9, 2015, the U.S. District Court in Tampa approved an agreement in which the clinic will pay \$150,000 to settle the lawsuit and agreed to implement a new gender discrimination policy and provide training to its management and employees regarding transgender/gender stereotype discrimination. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Civ. No. 2:14-cv-13710-SFC-DRG, filed on Sept. 25, 2014, the EEOC sued a funeral home company for alleged sex discrimination for firing a funeral director/embalmer for being transgender.

conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). Although Title VII of the Civil Rights Act of 1964 does not explicitly identify "sexual orientation" or "gender identity" as separate protected classes, the EEOC interprets the prohibition against discrimination on the basis of "sex" as prohibiting discrimination against employees on the basis of sexual orientation or gender identity.

1. EEOC Appeal Decisions

A. Sexual Orientation Discrimination as Sex Discrimination

On July 15, 2015, the EEOC decision in *David Baldwin v. Anthony Foxx*, EEOC Appeal No. 0120133080, reiterated the EEOC's position that Title VII's prohibition against sex discrimination incorporates a prohibition against discrimination on the basis of an employee's sexual orientation or gender identity. The EEOC reasoned that "sex" under Title VII includes "sex" (biological differences between men and women) as well as gender and gender stereotyping (the failure to act and appear according to societal expectations defined by gender) and noted that the two terms "gender" and "sex" are often used interchangeably in the Title VII context. *Baldwin* at p. 5. The EEOC stated that the issue is not whether sexual orientation is explicitly listed in Title VII; it clearly is not, but rather whether the agency has "relied on sex-based considerations" or "[t]aken gender into account" when taking the challenged employment action." *Id.* at p. 6. The EEOC reasoned that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex" and noted that the same would be true if the complainant was straight. *Id.* at p. 7. The EEOC noted that federal courts have adopted the same analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. *Id.* at p. 7 n.6 (citing *Videckis v. Pepperdine Univ.*, Case No. CV 15-00298 DDP (JCx), 2015 WL 1735191, at *8 (C.D. Cal. Apr. 16, 2015) (Title IX – "For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934-35 (W.D. Mo. 2014) (Equal Protection Clause – "The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification" and violates the Equal Protection Clause).³

³ The United States Supreme Court ("SCOTUS") ruled on June 26, 2015, that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. *Obergefell, et al., v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, the SCOTUS addressed a Circuit split on the issue and held that the right to marry is a fundamental right inherent in the liberty of the person and that therefore same-sex marriage was protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, thereby legalizing same-sex marriage across the country.

The EEOC also stated that sexual orientation discrimination is sex discrimination because it is associational discrimination on the basis of sex, treating an employee less differently for associating with a person of the same sex and recognized that this could also apply to heterosexuals. *Id.* at pp. 8-9 (comparing this to prohibited race discrimination based on interracial marriage or friendships as recognized in *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008)). In *Floyd* and *Holcomb*, those Circuit Courts found the discrimination unlawful because it was based on an employee's relationship with a person of another race and therefore necessarily involved considerations of the employee's race.

The EEOC also found that sexual orientation discrimination is sex discrimination because it necessarily involves discrimination based on gender stereotypes. *Id.* at p. 9 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989) (plurality opinion)). LGBT employees could bring gender stereotyping claims under Title VII if they are able to demonstrate that they were treated adversely because they were viewed, based on their appearance, mannerisms, or conduct, as insufficiently "masculine" or "feminine." *Id.* at p. 9. The EEOC emphatically stated that it did "not view the borders between sex discrimination and sexual orientation as 'imprecise' ... [D]iscrimination based on the basis of sexual orientation necessarily involves discrimination on the basis of sex." *Id.* at p. 12 n.12. The EEOC noted that it and the federal courts have gone away from the traditional view that Title VII offered no protection simply because sexual orientation was not an enumerated protected class. *Id.* at p. 12. "Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80 (1998) ("[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.") The EEOC determined that the law does not need to create a new class of covered persons for every situation (ie: interracial relationships, which are covered by race; "masculine women," which are covered by sex; or non-believers, which are covered by religion). *Id.* at p. 14. The EEOC held that allegations of discrimination based on sexual orientation state a claim of discrimination on the basis of sex if the complainant can show that the treatment would not have occurred but for the individual's sex; the discrimination was based on the sex of the person(s) the individual associates with; or the discrimination is premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted to only those of the opposite sex. *Id.* at p. 14. The EEOC's *Baldwin* ruling directs federal agencies to treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and to process them accordingly.

Although the EEOC's decision in *Baldwin* was focused on timeliness and jurisdictional issues on appeal, the EEOC discussed in detail current federal case law and the EEOC's position on these issues. The EEOC did not render a

decision on the merits of the employee's claim but rather remanded it back to the agency.

B. Gender Identity Discrimination as Sex Discrimination

The EEOC held in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012) that discriminating against an individual because that person is transgender (in other words, discriminating on the basis of the individual's gender identity) is unlawful discrimination based on sex and violates Title VII. The *Macy* decision recognizes a limited exception for an employer to take gender into account only when gender is a "bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation of the particular business or enterprise. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality decision)). The BFOQ exception is extremely narrow. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (referencing Justice Marshall's concurring opinion in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971)). This opinion also cited various federal cases recognizing that sex discrimination included gender discrimination. *Id.* (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (sex encompasses both the biological differences between men and women and gender); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (*Price* stated gender discrimination includes gender stereotyping.); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) ("Such practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different.'")

C. Federal Case Law

In *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998), the SCOTUS held that same-sex harassment is sex discrimination under Title VII. Justice Scalia noted in the majority opinion that while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII ... statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." The next year, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989), a plurality opinion, the SCOTUS recognized that employment discrimination based on sex or gender stereotypes, such as assumptions and/or expectations about how persons of a certain sex should dress, behave, etc., is unlawful sex discrimination under Title VII. In *Price*, an accounting firm employee was denied a promotion because the partners felt that she did not act as a woman should act. The Court found that "sex stereotyping, [when] an employer acts on the basis of a belief that a woman cannot be

aggressive, or that she must not be, has acted on the basis of gender” and that such discrimination constituted sex discrimination under Title VII.

Several federal district courts in other jurisdictions have likewise recognized protection against discrimination on the basis of sexual orientation and/or gender identity.

1. Gender Identity

In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), a transgender female brought a claim under 42 U.S.C. § 1983 alleging unlawful sex discrimination in violation of the Equal Protection Clause when she was terminated from her position with the Georgia General Assembly. Relying on *Price Waterhouse* and other Title VII precedent, the court concluded that the defendant discriminated against the complainant based on her sex by terminating her because she was transitioning from male to female. The court stated that a person is considered “transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Id.* at 1316. “There is thus a transgression between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.” *Id.* “The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause.” *Id.* at 1319.

In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit relied on *Price Waterhouse* to determine that Title VII prohibits discrimination against transgender individuals based on gender stereotyping. In *Smith*, the plaintiff alleged that he was suspended based on sex after he began to express a more feminine appearance and notified his employer that he would eventually undergo a complete physical transformation from male to female. *See also Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (finding that a police officer who presented as a male on duty but often lived as a woman off duty and who had a reputation in the police department as a homosexual, bisexual, or cross-dresser had stated sex discrimination under Title VII for discrimination based on his failure to conform to sex stereotypes). In *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000), the First Circuit held that a transgender plaintiff, who was biologically male, stated a claim of sex discrimination under the Equal Credit Opportunity act by alleging that he was denied a loan application because he was dressed in traditionally female attire. In *Schwenk v. Hartford*, 204 F.3d at 1202, the Ninth Circuit found that a transgender woman stated a claim of sex discrimination under the Gender Motivated Violence Act based on the perception that she was a “man who ‘failed to act like one.’”

2. Sexual Orientation

In *Hall v. BNSF Ry. Co.*, No. 13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), the court recognized sexual orientation discrimination as sex

discrimination when a male married to a male was not afforded health care benefits. The Court found this unlawful because the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. In *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002), the federal district court stated that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks 'real' men should date women and not other men."

3. Tenth Circuit and the Western District of Oklahoma

The federal courts with jurisdiction over the City of Norman, the Western District of Oklahoma and the Tenth Circuit Court of Appeals, have also addressed the issue. In *Medina v. Income Supp. Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005), the Tenth Circuit found that sexual orientation is not a protected class. "We construe Ms. Medina's argument as alleging she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality." (quoting *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 263-64 (3rd Cir. 2001) for the proposition that "Congress has repeatedly rejected legislation that would have extended title VII to cover sexual orientation."). The Tenth Circuit confirmed this ruling in an unpublished opinion in 2006. "[S]exual orientation discrimination is not a recognized cause of action under Title VII." *Essary v. Fed. Expr. Corp.*, Case No. 05-2091, 2006 WL 31128, at *4 (10th Cir. Jan. 6, 2006) (citing *Medina*, 413 F.3d at 1135). The only Western District case found citing the discussion in *Medina* is *Thomas v. Corrs. Corp. of America, Inc.*, Case No. CIV-07-1378-D, 2010 WL 565272, at *4 (W.D. Okla. Feb., 11, 2010) wherein Judge DeGiusti acknowledged that same-sex harassment may be actionable under Title VII (citing *Oncale*, 523 U.S. at 80 and *Medina*, 413 F.3d at 1131).

Two years after *Medina*, in 2007, the Tenth Circuit held that transsexuals could not claim Title VII protection based solely on their status as a transsexual but acknowledged that, "like all other employees, [Title VII] protection [against sex discrimination] extends to transsexual employees only if they are discriminated against because they are male or because they are female." *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007). The Tenth Circuit found that discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Id.* at 1221. "[T]here is nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." *Id.* at

1221-22. The Court explicitly rejected the argument that transsexuals were a protected class under Title VII. *Id.* at 1222.

The Tenth Circuit acknowledged in *Etsitty*, however, that a number of courts had relied on *Price Waterhouse* to expressly recognize a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms. *Id.* at 1223. The Court also found, though, that it did not need to "decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex'" or whether "such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex" because the Court found that the plaintiff had not presented a genuine issue of material fact as to whether her employer's stated motivation for termination was pretextual. *Id.* at 1224.

The Tenth Circuit has not yet made an affirmative ruling on this issue of whether a transsexual could assert a Title VII sex discrimination claim for failure to conform to gender stereotypes.⁴ There is a recent district court decision in the Western District, however, where Judge Cauthron found that the plaintiff's allegations of discrimination were based on the fact that she was female, yet her employers regarded her as a male. *United States of America and Dr. Rachel Tudor v. Southeastern Okla. State Univ.*, Case No. CIV-15-324-C, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015). In this case, the plaintiff alleged sex discrimination and retaliation under Title VII following her transition from male to female. Dr. Tudor alleged that at the time she announced her intent to change gender, her employer began treating her differently, ultimately denying her tenure application. *Id.* at *1. Her employer filed a Motion to Dismiss, arguing that she was not a member of a protected class since the Tenth Circuit held in *Etsitty* that a transsexual individual is not a member of a protected class. *Id.* at *2. Judge Cauthron stated that "the reasoning relied on by the Tenth Circuit is inapposite here." *Id.* at *2. Judge Cauthron denied the Motion to Dismiss, finding that the Tenth Circuit's *Etsitty* decision merely held that transsexuals could not claim protection under Title VII based solely on their status as a transsexual but that they, like other employees, could assert a claim of discrimination based on their gender. *Id.* at *2. "[L]ike all other employees, such [Title VII] protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.' Here, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took

⁴ In an unpublished 2012 decision in *Larson v. United Air Lines*, Case No. 11-1313, 2012 WL 1959471, at *3 n.1 (10th Cir. June 1, 2012), the Tenth Circuit noted that Title VII discrimination is only cognizable on the basis of sex, not sexual orientation, and that to the extent the plaintiff attempted to argue that he was furloughed because of his status as a gay male and not just a male, he did not present a claim under federal law. *Larson* at *3 n.1 (citing *Etsitty*, 502 F.3d at 1222).

against her were based upon their dislike of her presented gender.” *Id.* at *2 (quoting *Etsitty*, 502 F.3d at 1222). Judge Cauthron noted that the Tenth Circuit’s discussion in *Etsitty* cited *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) and its holding that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.” *Id.* at *2 (quoting *Smith*, 378 F.3d at 566). Judge Cauthron denied the Motion to Dismiss, finding that “the discrimination occurred because of Dr. Tudor’s gender, and she falls within a protected class.” *Id.* at *2. This case is still pending. A Scheduling Order [Doc. No. 39] was entered on July 28, 2015. Dispositive motions are due by August 1, 2016.

III. Summary and Analysis

The EEOC has consistently taken the position that even though they are not specifically enumerated protected classes in Title VII, discrimination based on both sexual orientation and gender identity constitute impermissible sex discrimination. There are several federal cases at both the district court and appellate levels that are consistent with this analysis. The Tenth Circuit Court of Appeals, which governs claims brought within the geographical boundaries of the City of Norman, however, has explicitly rejected the arguments that sexual orientation and gender identity are protected under Title VII, although the Tenth Circuit did state in *Etsitty* that a transgender employee, like any employee, could assert a sex discrimination case if the discrimination was based on the employee’s gender. One pending Western District of Oklahoma case has recognized that a transgender employee can fall into a protected class for asserting that she suffered discrimination due to gender non-conformity.

The EEOC appellate decisions are only binding on federal agencies, but they clearly reveal the EEOC’s position on these issues and are consistent with interpretation provided by other federal courts. Although neither sexual orientation nor gender identity are specific protected classes, consistent with *Price Waterhouse* and its progeny, LGBT individuals could assert a cause of action for sex discrimination if they can show that they were treated differently or less favorably due to their gender or to their failure to conform to gender stereotypes. In other words, even though sexual orientation and gender identity are not protected classes themselves, LGBT individuals can seek protection under Title VII’s prohibition against sex discrimination.

Similarly, HUD’s administrative regulations do not, and can not, create additional protected classes for sexual orientation and gender identity under the FHA, but LGBT individuals are still protected from discrimination in housing based on these characteristics under HUD’s Equal Access Rule.

Federal civilian employees and employees of federal contractors are specifically protected from discrimination based on sexual orientation and gender identity by President Obama's EO 13672.

Section 7-101(a) of the City's Code of Ordinances provides that "[i]t is the policy of the City of Norman that all citizens of this community shall have an equal opportunity to purchase, rent, lease or occupy housing accommodations, or to avail themselves of public accommodations, and have an equal opportunity in the job market and the social and economic life of the City, without regard to race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status. It is further declared and determined to be the policy of the City of Norman that all citizens of this community should be provided with an opportunity to reach their full potential as human beings, without being inhibited by conditions relating to race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status." Subsection (b) provides that "[t]he provisions and sections of this chapter shall be liberally construed in order to further the general purpose of this declaration of policy and objectives."

Although the City's Civil Rights Ordinance does not specifically provide protection for sexual orientation and gender identity, the City has taken other steps in support of being a more inclusive community, particularly for LGBT citizens. In addition to the City's Civil Rights Ordinance, initially passed in 1986, City Council also passed Resolution R-0809-12 on July 22, 2008, to participate in the National League of Cities' Partnership for Working toward Inclusive Communities, confirming its commitment "to inclusion as a fundamental aspect of our community" and noting that the National League of Cities and its members "believe an inclusive community promotes equal opportunity and fairness . . . and promotes citizen participation and engagement." The HRC has hosted various Inclusive Community Dialogues with different citizen populations to gain input from the public on how the City could serve those populations better. In regards to LGBT issues, the City issued a proclamation P-1011-3, declaring October, 2010, as Gay, Lesbian, Bisexual, and Transgendered History Month in the City of Norman. In June, 2013, the City amended its Harassment Policy, § 301 of the Personnel Manual, to specifically state that disparate treatment of an employee in areas of human resources management motivated by an employee's sex, sexual orientation, or gender identity will not be tolerated. The City conducted City-wide training of all employees to make them aware of the new policy language. The City of Norman was rated by the Human Rights Campaign, a national LGBT advocacy group in Washington, D.C., with a rating of 61 out of 120 total possible points on its 2014 Municipal Equality Index, a scorecard that ranks cities on their progress toward equality for LGBT citizens. This was the highest ranked City in Oklahoma.

In light of the authorities cited above and the actions taken by federal enforcement agencies, an aggrieved LGBT individual alleging discrimination based on sexual orientation or gender identity could pursue civil rights remedies under Title VII and the FHA in certain instances. An aggrieved individual

complaining of employment discrimination can file a charge with the EEOC. An aggrieved individual complaining of housing violations can file a complaint with HUD. An aggrieved individual complaining of discrimination in public accommodations could pursue a civil lawsuit against that establishment or could file a complaint with the Oklahoma Attorney General Office of Civil Rights Enforcement ("OCRE"), which enforces the Oklahoma Anti-Discrimination Act, 25 O.S. §§ 1101-1706, which prohibits discrimination in employment, housing, and public accommodation, as well as enforces other civil rights related laws.

Discrimination on the basis of sexual orientation or gender identity, through interpretation of the City's Civil Rights Ordinance, could be found if in accordance with case law cited above. Although the Tenth Circuit has not taken as explicit a stance on protection of LGBT individuals as some other circuits have taken, LGBT individuals already have some protection if they can show that the discrimination was based not on the fact that they are LGBT but rather on the fact that they have been treated differently or less favorably because of their sex or gender or a failure to conform to certain gender stereotypes.








Please let us know if you have additional questions or concerns.

Cc: Steve Lewis, City Manager

LEGAL UPDATE

Sexual Orientation & Gender Identity Protection

October 26, 2015

<p>Executive Order 13672</p>  <ul style="list-style-type: none"> -Issued by President Obama -July 21, 2014 -Prohibits SO & GI discrimination against federal civilian employees & federal contractors 	<p>HUD's Equal Access Rule</p>  <ul style="list-style-type: none"> -77 FR 5662 -February 3, 2012 -Applies to HUD-assisted & insured housing -Housing eligibility can not be based on actual or perceived SO, GI, or marital status -Definitions of "family," "SO," and "GI"
<p>EEOC Interpretation</p>  <ul style="list-style-type: none"> -Employees of federal agencies & private employers with > 15 EEs -David Baldwin v. Anthony Foxx, EEOC Appeal No. 0120133080 (July 15, 2015): "sex discrimination" includes discrimination based on sexual orientation -Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2012): "sex discrimination" incorporates discrimination based on gender identity -Limited Bona Fide Occupational Qualification ("BFOQ") exception 	<p>Federal Case Law</p>  <ul style="list-style-type: none"> -Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998): same-sex harassment = sex discrimination under Title VII -Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality): employment discrimination based on sex or gender stereotypes = unlawful sex discrimination under Title VII -Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011): held GI discrimination (transgender female) = sex-based discrimination -Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014): SO discrimination = sex discrimination (health care benefits)
<p>Tenth Circuit</p>  <ul style="list-style-type: none"> -Medina v. Income Supp. Div., 413 F.3d 1131 (10th Cir. 2005) -Held SO not a protected class under Title VII -Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007): discrimination vs. a transsexual based on status as a transsexual is not sex discrimination under Title VII... -... but "like all other employees, [Title VII] protection [against sex discrimination] extends to transsexual employees only if they are discriminated against because they are male or because they are female" -GI not a protected class under Title VII 	<p>Western District of Oklahoma</p> <ul style="list-style-type: none"> -Thomas v. Corrs. Corp. of Amer., Inc., Case No. CIV-07-1378-D, 2010 WL 565272 (W.D. Okla. Feb. 11, 2010): same sex harassment may be actionable under Title VII -U.S.A. & Tudor/Southeastern Okla. State Univ., Case No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015): denied Employer's Motion to Dismiss, finding that allegation (that transgender female was denied tenure) was an allegation that the employer's actions occurred because she was female yet defendants regarded her as male & was based on dislike of her presented gender -Still pending -Dispositive motions due 08/01/16 

A RESOLUTION OF THE COUNCIL OF THE CITY OF NORMAN ACKNOWLEDGING RECENT DEVELOPMENTS IN FEDERAL LAW INTERPRETING TITLE VII SEX DISCRIMINATION PROTECTION PROHIBITING SEX BASED CONSIDERATIONS IN EMPLOYMENT AND IN CHAPTER 7 OF THE CITY OF NORMAN CODE OF ORDINANCES TO INCLUDE GUARDING AGAINST CONSIDERATION OF SUCH ASSUMPTIONS OR STEREOTYPES STEMMING FROM SEXUAL ORIENTATION OR GENDER IDENTITY AND SETTING FORTH THE POLICY OF THE CITY OF NORMAN THAT THE REASONING PROVIDED THEREIN BE INCORPORATED INTO CITY POLICY WHEN ADDRESSING SUCH ISSUES.

- § 1. WHEREAS, on August 19, 1986, the City of Norman adopted Ordinance O-8687-2 prohibiting discrimination against citizens based on race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status; and
- § 2. WHEREAS, in Chapter 7, Section 7-101 of the Code of the City of Norman, it is the stated policy that all citizens of this community shall have an equal opportunity to purchase, rent, lease or occupy housing accommodations, or to avail themselves of public accommodations, and have an equal opportunity in the job market and the social and economic life of the City, without regard to race, color, religion, ancestry, sex, national origin, age, place of birth, handicap, or familial status; and
- § 3. WHEREAS, on July 22, 2008, the City of Norman adopted Resolution R-0809-12 joining the National League of Cities' Partnership for Working toward Inclusive Communities and affirming inclusion as a fundamental aspect of the community; and
- § 4. WHEREAS, under the Norman City Charter, the City Council, as the governing body for the City of Norman, is the policy making body, and the City Manager is charged with administrative responsibility to administer and enforce City policies and ordinances; and
- § 5. WHEREAS, the City Council, as governing body, desires to formally express to the City Manager its intent regarding certain City policies and ordinances related to sex discrimination issues; and
- § 6. WHEREAS, the U. S. Supreme Court has recently extended federal protection under the 14th Amendment to the U. S. Constitution to include the fundamental right of all citizens to have equal access to marriage regardless of sexual orientation, and to protect such marriages and the children being raised in those marriages; and
- § 7. WHEREAS, interpreting the City of Norman's existing prohibition against sex discrimination in Chapter 7 of the City of Norman Code of Ordinances to include assumptions and stereotypes associated with discrimination based on sexual orientation and gender identity would be consistent with the interpretation given such language under

Title VII of the Civil Rights Act of 1964 by the Equal Employment Opportunity Commission (EEOC) for all workplaces with 15 or more employees and with the federal government's policy to prohibit discrimination based on sexual orientation and gender identity within executive branch civilian employment and employees of federal contractors; and

- § 8. WHEREAS, interpreting the City of Norman's existing prohibition against sex discrimination in Chapter 7 of the City of Norman Code of Ordinances to include assumptions or stereotypes associated with sexual orientation and gender identity would be consistent with the interpretation of such language under the Fair Housing Act by the federal Department of Housing and Urban Development (HUD), EEOC guidance, and trends in U.S. Supreme Court jurisprudence and would further the City's policy of inclusion to ensure that all citizens shall enjoy equal rights.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NORMAN, OKLAHOMA:

- § 9. THAT the City Manager of the City of Norman be directed to administer all City personnel policies prohibiting discrimination based on sex in such a manner that respects the Council's policy guidance to guard against use of assumptions or stereotypes associated with sexual orientation and gender identity; and
- § 10. THAT the City Manager of the City of Norman be directed to administer City policy consistent with this Resolution, and further be directed to administer Chapter 7 of the City of Norman Code of Ordinances, wherein sex discrimination is prohibited, in such a manner that respects the Council's policy guidance to guard against use of assumptions or stereotypes associated with sexual orientation and gender identity.
- §11 THAT notice of this Resolution shall be made accessible to the public on the City's website and in its relevant public documents.

PASSED AND ADOPTED this _____ day of _____, 2015.

Mayor

ATTEST:

City Clerk

ITEM 2

UPDATE ON UNP TIF DISTRICT



DATE: December 7, 2015

TO: Honorable Mayor and Councilmembers

THROUGH: Jeff H. Bryant, City Attorney
FROM: Kathryn L. Walker, Assistant City Attorney

RE: University North Park Tax Increment Finance District Update
Amendment to Development Agreement No. 5

BACKGROUND

Staff last presented an update on the University North Park (“UNP”) Tax Increment Finance (“TIF”) District in July 2015. At that time, several UNP related items were scheduled for Council consideration, a traffic study was underway, and Staff was negotiating amendments to Development Agreement No. 5 with the Developers for UNP.

Since the July update, Council has:

- approved a PUD amendment that reduced the setback and streetscape buffer requirements for the “panhandle” area of the development to accommodate over 115,000 square feet of office space;
- approved the Final Plat and Final Site Development Plan for 8.3 acres of proposed multi-family development adjacent to property owned by the Norman Economic Development Coalition. This development will bring 303 apartment units and a parking garage to the north half of UNP;
- will consider another PUD amendment on December 22, 2015 (1st reading on December 8, 2015) that will allow three additional uses – (1) mixed buildings (buildings with office or commercial uses on the bottom and dwelling units on the upper floor), (2) bar, lounge or tavern and (3) live entertainment venue in the Lifestyle Center area and a nearby outparcel where the World of Beer is proposed to be located.

In addition, Garver Engineering has finalized Phase B of the Traffic Impact Study and it is anticipated that the final report will be ready for distribution in January. Finally, Staff and the Developer have agreed to a draft of Amendment No. 1 to Development Agreement No. 5. The purpose of this memorandum is to provide a summary of the proposed Amendment.

DISCUSSION

The proposed Amendment to Development Agreement No. 5 addresses four primary areas: Coordinated Master Planning; Construction of Entrances into the District and Lifestyle Center; Incentive criteria updating and clarification; and Timeline extensions for Lifestyle Center and Cultural Facility development.

office memorandum

Coordinated Master Planning

The PUD document for the UNP TIF District reflects a Master Development Plan in 2005 before the adoption of the UNP TIF District that focused primarily on retail development in land that was located south of Rock Creek Road. That PUD Document contained a detailed Preliminary Plat for the retail district and a more generalized plan for the land area north of Rock Creek Road. The retail district, owned by UTC LLC, has developed as planned, with a remaining component being the Lifestyle Center.

The property in the District north of Rock Creek Road, owned by UNP LLC (subsidiary of the OU Foundation) has moved forward with development in accordance with Special Planning Areas (SPA's) that allow a certain mixture of office, industrial, and residential uses. Currently, retail is excluded from being an allowable use on land north of Rock Creek. The development that has proceeded there includes the NEDC Industrial Park (IMMY's location), NEDC Office Park, the office park located on the panhandle area, and the high density residential complex approved in October.

Before moving forward with additional development north of Rock Creek, staff and UNP LLC have agreed that an update of the Master Planning for this area is appropriate. UNP LLC has engaged the services of RTKL, a Dallas firm that was involved in the original Master Planning effort to re-engage and provide such an update after completing additional market analysis. Staff supports such an update at this time, particularly given the level of development being reached in the south ½ of the UNP District, near completion of an updated Traffic Impact Analysis (TIA), discussion over the past year about an Exposition Center, and other potential sports or entertainment uses.

RTKL has offered to include in its effort a similar market based Master Planning effort for the area known as the Lifestyle Center. In the past, Council and the Developer have struggled with whether the original Lifestyle Center concept is economically viable, with the need for potential modification of the concept formally recognized in Development Agreement No. 5. While there have been a number of retailers interested in locating in this land area, the Developer has held back on moving forward in an effort to continue to explore the viability of an entertainment type district that was originally envisioned. As a follow up to Council member comments last summer, RTKL has been asked to evaluate the Lifestyle Center property considering urban design concepts, walkability, and connectivity in the study. Staff anticipates gaining additional information concerning the viability of these concepts, not only for the Lifestyle Center area also for the remaining undeveloped land north of Rock Creek as well. RTKL's efforts will cost \$40,000. UNP LLC will pay ½ of the cost as it relates to property north of Rock Creek. The remainder of the study cost is proposed to be borne by NTIFA from the Professional services allocation from the Project Plan.

Construction of Entrances into the District and Lifestyle Center

For several years Council has expressed a strong interest in constructing an entrance into the UNP TIF District to help convey a sense of place. The Amendment sets forth a timeline and funding mechanism for the proposed entrance into the development at Robinson Street and the proposed entrance into the Lifestyle Center. The entrances were preliminarily designed in 2013 and presented to Council at that time. Since that time, the parties have worked on funding mechanisms and struggled with the question of timing.

Regarding the Lifestyle Center entrance, the Parties recognize that anchor tenants in the Lifestyle Center may want significant input into the entrance design. For that reason, although funding is

addressed in the agreement, designs and construction will not be finalized until the first anchor tenant has committed to the Lifestyle Center. For the Robinson Street entrance, under this Amendment, the design would be finalized in the spring, with construction being completed in late 2016.

The funding for the entrance improvements would be shared equally between three funding sources: UTC (the developer); NTIFA (enhanced landscaping allocation); and UNP Business Improvement District funds. The Business Improvement District Advisory Board unanimously approved of this funding structure at its last meeting in November 2015. Use of BID funds in this fashion to encourage development in the District is consistent with the Bid Petition supported by property owners in the District. In 2013, the estimated cost of both entrances was approximately \$837,000. The Amendment to the Development Agreement caps each funder's responsibility at \$300,000 for both entrances without additional negotiation and agreement.

The architect originally retained to provide the conceptual design, Frank Goppold and Associates, will be retained to produce final plans and specifications. It is anticipated the final plans can be ready in the spring, bidding and construction anticipated to begin in the summer of 2016, and the project anticipated to be completed in November of 2016. The project will be subject to competitive bidding processes.

Incentive criteria updating and clarification

Council has previously reviewed information from Sara Kaplan, Retail Marketing Coordinator that indicated the retail performance levels for incentives may be a little low if the goal was to attract certain types of higher end stores. This information has been shared with the Developer. To further solidify the commitment of the Parties to the Lifestyle Center vision, the Developer has agreed that the "floor" for retail incentives should be raised.

Currently, Lifestyle Center Project Costs (incentives) can be made available for expenses related to a retailer that fits two of three criteria:

- (1) The retail store doesn't exist within a 21 mile radius;
- (2) The retail store must demonstrate an anticipated minimum sales volume of not less than **\$175** per square foot for retail stores larger than 10,000 square feet or not less than **\$275** per square foot for retail stores 10,000 square feet or smaller; or
- (3) The retail store shall be relocated from outside Norman.

The Amendment to the Development Agreement would require all three of the following criteria are met before Council could consider any Lifestyle Center Project Costs (incentives) for a particular retail project:

- (1) The retail store does not exist in Norman;
- (2) The retail store can demonstrate anticipated minimum sales volumes of no less than **\$300** per square foot for stores larger than 10,000 square feet or no less than **\$400** per square foot for stores of 10,000 square feet or smaller; and

- (3) The parcel development plan incorporates urban design elements of walkability and connectivity.

The primary difference is removal of the 21 mile radius as separate qualifying criteria, in exchange for higher retail sales performance standards and incorporation of urban design elements into the criteria. The Developer has agreed to these modifications which Staff believes are consistent with Council's direction given last summer.

Timeline extensions for Lifestyle Center and Cultural Facility development

Previous discussions with Council have focused on the shared desire of the Developer and the City that the Lifestyle Center be developed in conformance with the vision the parties shared in 2005/2006, while recognizing market conditions have changed considerably since the 2008 recession. As mentioned above, although the Developer has had a number of stores requesting to be located in the Lifestyle Center area that would have enabled UTC to avoid reimbursement of public improvement costs associated with failure to timely develop the Lifestyle Center, the Developer has consistently turned these stores away or encouraged them to develop in other areas of UNP because these stores were not consistent with the vision for the Lifestyle Center.

Although the timeline for shell completion of 250,000 square feet of retail space in the Lifestyle Center was changed with Development Agreement No. 5 from January 1, 2016 to January 1, 2018, the development of a Lifestyle Center is at least a three-year process. To date, the desired retailers for the Lifestyle Center have yet to formally commit to locate in the Lifestyle Center. Discussions have been ongoing since before 2008.

The current national retail landscape continues to exhibit signs of recovery, with store expansions occurring on a smaller scale and at a slower pace. Although smaller stores are rebounding more quickly, larger box stores have been slow to expand into new areas. Recent trends indicate that large anchor tenants may be more likely to open new locations that afford the opportunity for a smaller footprint. Additionally, many shopping centers are filling with small stores and opportunities for entertainment, like movie theaters, concert halls, and the like. As recently as this fall after the opening of Legacy Park, the Developer met with a national company known for Lifestyle Center development to explore a potential partnership to assist in this type of development.

Rather than forego the vision and fill the Lifestyle Center with stores just to meet the square footage timeline necessary to avoid the public improvement reimbursement obligation (146,000 sq. ft.) the Developer is interested in partnering with the City and cooperating with the master planning efforts noted above. It is believed such an effort will help the Developer and the City focus on retail information that is specific to Norman, while test fitting a variety of uses and densities to ensure the master plan meets the vision of Norman and the Developer, while identifying retail targets that are most likely to be successful in Norman. Staff has shared the concerns expressed by Council regarding walkability in the development as a whole, but particularly in the Lifestyle Center area. The Developer is open to exploring concepts that provide greater connectivity between Legacy Park, the hotels to the north, and the Lifestyle Center.

After much discussion, the Developer has agreed that extending the Lifestyle Center construction deadline to June 30, 2023 gives it sufficient time to focus on developing the Lifestyle Center in accordance with the original vision. If mutually agreeable concepts of urban design, walkability, and/or mixed use are utilized, the deadline is further extended through June 30, 2026. Credit against

the obligation to reimburse the NTIFA for public improvement costs associated with failure to timely develop Lifestyle Center square footage can be granted if the stores meet the following criteria, even if not seeking TIF funding from the Lifestyle Center project costs:

- location of store is in area 5 on Exhibit F to Development Agreement No. 5;
- the stores were not operating in Norman prior to construction of the Lifestyle Center; and
- the stores are able to demonstrate an average of \$175 in sales per square foot for a full year following completion of 145,778 of square feet in the LifeStyle Center.

This approach strengthens the performance necessary to avoid the public improvement reimbursement obligation by requiring the construction of stores that perform at a minimum sales threshold of \$175 in sales per square foot and ensuring the recruitment of stores not already existing in Norman.

In exchange for providing for an extension of the deadline, the Developer has agreed to grant a similar extension, to June 30, 2026, of the deadline by which the City must develop the cultural facility land. Development Agreement No. 5 identified the cultural facility land as land to the south and east of the Conference Center. This amendment would allow for a substitute donation so that the new potential site for a cultural facility would be adjacent to the Embassy Suites. Additionally, the Developer has agreed to sell the NTIFA/City an additional 1.5 acres of land adjacent to the substitute donation site at \$5 a square foot. This land will be reserved for such a purchase until June 30, 2026, giving the City plenty of time to decide how the cultural facility could best be moved forward.

RECOMMENDATION

The Amendment to Development Agreement No. 5 addresses Council's concerns expressed last summer. A coordinated Master Planning effort for the remaining undeveloped land in the UNP District will move forward allowing a basis for a potential update of the PUD document. Review of market data, as well as urban design concepts of walkability and connectivity will be addressed in the planning. Construction of entrances into the District at Robinson Street and into the Lifestyle Center is being addressed both in timing and in cost sharing, as approved by the UNP BID Board. Incentive criteria is being upgraded and clarified. Timelines are being extended for both the Lifestyle Center and the Cultural Facility to allow for additional time to explore marketability and properly plan these last two components of the Project Plan. The Amendment will be presented to the UNP TIF Oversight Committee on Tuesday. It is anticipated the Amendment will be on Council's Agenda for the December 22, 2015 meeting. Staff will be available to answer questions or provide additional information.

Reviewed by: Steve Lewis, City Manager
Susan Connors, Director of Planning & Community Development
Anthony Francisco, Director of Finance
Sara Kaplan, Retail Marketing Coordinator

AMENDMENT NO. 1 TO DEVELOPMENT AGREEMENT NO. 5

**RELATED TO DEVELOPMENT OF THE
NORMAN UNIVERSITY NORTH PARK PROJECT**

BY AND AMONG

THE CITY OF NORMAN, OKLAHOMA

AND

NORMAN TAX INCREMENT FINANCE AUTHORITY

AND

UNIVERSITY NORTH PARK, LLC

AND

UNIVERSITY TOWN CENTER, LLC

AND

UNP REALTY INVESTORS, LLC

DATED AS OF _____, 2015.

AMENDMENT NO. 1 TO DEVELOPMENT AGREEMENT NO. 5

RELATED TO DEVELOPMENT OF THE UNIVERSITY NORTH PARK PROJECT

THIS AMENDMENT NO. 1 TO DEVELOPMENT AGREEMENT NO. 5 SETTING FORTH OBLIGATIONS RELATED TO DEVELOPMENT OF THE UNIVERSITY NORTH PARK PROJECT (the “Agreement”) is made on or as of the ____ day of _____, 2015, by and between **THE CITY OF NORMAN**, an Oklahoma municipal corporation (the “City”), the **NORMAN TAX INCREMENT FINANCE AUTHORITY**, an Oklahoma public trust (the “Authority”), **UNIVERSITY NORTH PARK, LLC**, an Oklahoma limited liability company (“UNP”), which is a wholly-owned subsidiary of The University of Oklahoma Foundation, Inc. (the “OU Foundation”) (as defined herein), **UNIVERSITY TOWN CENTER, LLC**, an Oklahoma limited liability company (the “Developer”), and **UNP REALTY INVESTORS, LLC**, an Oklahoma limited liability company and wholly owned subsidiary of the OU Foundation (the “Purchaser”), which are collectively herein referred to as “Parties.”

WITNESSETH:

WHEREAS, the City, by Ordinance No. O-0506-66, adopted May 23, 2006 (the “TIF Ordinance”), pursuant to the Oklahoma Local Development Act, Title 62, Oklahoma Statutes, Section 851, *et seq.*, adopted and approved the Norman University North Park Project Plan (the “Project Plan”) and the project therein described (the “Project”); and

WHEREAS, the Project supports achievement of the City’s economic development and redevelopment objectives for the Project Area, including reversal of urban stagnation, creation of a catalyst for expanding employment, attraction of major investment, preservation and enhancement of the tax base, and facilitation of investment, development and economic growth otherwise difficult, unlikely or impossible without the Project; and

WHEREAS, the City, as authorized in the Project Plan, has designated the Authority to undertake the financing, construction and development in support of the economic development activities and objectives of the Project; and

WHEREAS, pursuant to the Project Plan, the City and other parties have entered into a number of agreements relating to various facets of the development of University North Park and the use of Tax Increments in such development activities, which agreements are more particularly identified on Exhibit A hereto.

WHEREAS, the City, UNP, and the Developer have heretofore entered into the Master Agreement, (as hereinafter defined) for the purpose of providing a framework for the development of University North Park (as hereinafter defined); and

WHEREAS, the performance of the respective obligations of UNP and the Developer pursuant to the Master Agreement and the Project Plan is expected to generate several hundred million dollars of new investment and development, substantial new tax revenues, and significant net direct value to the City solely from commitments to transfer property to or for the benefit of the City or its designees by the Developer and UNP; and

WHEREAS, acting pursuant to the Master Agreement, the City, NTIFA, UNP, the Developer and the Purchaser entered into Development Agreement No. 5 to provide certain commitments including promotion of the development of a retail shopping center that will draw shoppers throughout the region and establish the appropriate timing of such a retail center in the Project Area, and the identification and facilitation of a transfer of the Cultural Facility Land of approximately two (2) acres in close proximity of the JQH Conference Center for use as an exhibit hall, cultural facility or other similar use, all to generate economic impacts and benefits desired by the community and provided by the Project Plan;

WHEREAS, the obligation of the Developer to sell additional land contiguous to the Cultural Facility Land under Development Agreement No. 5 expired on June 30, 2015; and

WHEREAS, retail expansion of the type envisioned for the Lifestyle Center or other concept reasonably acceptable to the Authority is not occurring as quickly as was anticipated when Development Agreement No. 5 was adopted by the Parties; and

WHEREAS, the Parties remain committed to the goal expressed in the Project Plan and Development Agreement No. 5 that the retail space referred to as the Lifestyle Center in the Project Plan should be designed to draw retail shoppers not currently shopping in the City of Norman and should complement retail stores existing in Norman outside of the Project Area.

NOW THEREFORE in consideration of the premises and mutual obligations of the Parties hereto, each of them does hereby covenant and agree with the others to reaffirm all provisions of Development Agreement No. 5 except as amended or supplemented as follows:

ARTICLE IV. LIFESTYLE CENTER, CULTURAL FACILITY, PROJECT AREA AMENITIES, MASTER PLANNING OF UNDEVELOPED AREAS

SECTION 4.4.1 DEVELOPMENT OF REGIONAL DRAW GOALS. The Parties remain committed to retail development concepts for the Lifestyle Center that meet the goal of creating a regional draw, i.e. a draw of retail shoppers not currently shopping in the City. The Parties recognize that the anchor tenant for the Lifestyle Center will likely be selected first and that the Anchor will want input on surrounding development and design.

SECTION 4.4.2 LIFESTYLE CENTER DESIGN. The Parties agree to explore urban design, walkability, and mixed use possibilities for the Lifestyle Center. The Developer commits to cooperate with the NTIFA and the City to engage a firm hired to explore such urban design options that will enhance connectivity and walkability between the retail, recreation, restaurant, and hotel components in the Project Area. These options may include potential location of an anchor within the Lifestyle Center with direct street frontage to enhance visibility.

SECTION 4.4.3 EXTENSION OF LIFESTYLE CENTER DEADLINE. The Parties, in recognition of good faith efforts by the Developer to identify an appropriate Anchor tenant that meets the regional draw goals set forth by the Parties and related agreements, in recognition of delayed retail expansion by desired retailers meeting those goals, and in recognition of the other considerations made herein, the Parties agree that the deadline for shell completion of 250,000 square feet of retail space referenced in Section 4.3 of Development Agreement No. 5 is extended to June 30, 2023. Should the Developer opt to use a design for the

Lifestyle Center that achieves mutually agreeable urban design, walkability, and/or mixed use development concepts, the deadline for shell completion of 250,000 square feet of retail space shall be further extended through June 30, 2026.

SECTION 4.5.1 ACKNOWLEDGEMENT OF QUALIFYING STORE FOR SHELL COMPLETION OF 250,000 SQUARE FEET OF RETAIL SPACE. Development Agreement No. 5 acknowledged that the Crest Store, although not proposed to be located within the area understood to be the Lifestyle Center, would be recognized as qualifying towards the required 250,000 square feet of shell completion of Lifestyle Center retail space for the limited purpose of reducing the public infrastructure reimbursement provision set forth in Section 4.7 of Development Agreement No. 5 provided the following requirements are met: (1) the store is not relocating from within the Norman City limits, and (2) provided it demonstrates after the first twelve months of operation that it generates an anticipated minimum sales volume of not less than \$175 per square foot of its retail space. The Parties have confirmed that these requirements have been met and agree that the 250,000 square feet requirement for the Lifestyle Center to avoid public infrastructure reimbursement provisions is hereby reduced by 104,222 square feet to 145,778 square feet. The Developer reconfirms its intent to construct the additional retail space located in the designated Area 5 on Exhibit E, and consistent with the Project Plan such additional retail space will be designed to draw retail shoppers not currently shopping in the City of Norman and will complement retail stores existing outside of the Project Area. The Parties agree that the obligation to reimburse for public improvements as set out in 4.7, 4.71, and 4.72 below shall be removed with the occurrence of the following:

- (a) At least 145,778 square feet of retail space of shell completion is constructed in the designated Area 5 on Exhibit F;
- (b) Unless otherwise approved by NTIFA, retail stores recruited to fill the shell retail space in the designated Area 5 on Exhibit E shall be stores not operating in Norman prior to construction of the Lifestyle Center; and
- (c) Retail stores shall demonstrate an average of at least \$175 of retail sales per square foot when considering all stores located in the Lifestyle Center for a full year following the completion of at least 145,778 square feet of retail space.

Provided, however, credit to reduce the public improvement reimbursement amounts set out in 4.7, 4.71, and 4.72 may be earned incrementally based on construction of the building and occupancy of a qualifying retail store(s) in the Lifestyle Center at the rate of \$56.94 of credit per square foot. In order to qualify for incremental credit, the retail stores must meet regional draw goals as set forth in the Project Plan, specifically criteria (a)-(c) in the preceding paragraph. Any incremental credit earned will be based on retail floor space and annual retail sales subject to sales tax.

SECTION 4.6.1 SUBSTITUTE DONATION TO REPLACE ORIGINAL DONATION. Section 4.6 of Development Agreement No. 5 provides that the Developer would donate two (2) acres of land to the City for development as a Cultural Facility in accordance with the Project Plan. Section 4.6 identified the location of the “original donation” but also provided for a “substitute donation” at no cost to the City if the original donation was not sufficient in size

and no contiguous land was available for purchase. The Developer and the City hereby agree to a substitute donation of Cultural Facility Land to be located generally as depicted in Exhibit A. Title to the substitute donation will not transfer until development commences and will be concurrent with the sale of additional land, if any, as provided in Section 4.6.2.

SECTION 4.6.2 SALE OF ADDITIONAL LAND FOR THE DEVELOPMENT OF A CULTURAL FACILITY. The Developer agrees to reserve additional land, approximately 1.5 acres in size, continuous to the substitute donation depicted on Exhibit A for sale to the City. The Developer agrees to reserve this additional land to sell to the City for a price of \$5 per square foot at the City's option until June 30, 2026. Should the City purchase additional land, it shall be considered part of the Cultural Facility Land.

SECTION 4.7 REIMBURSEMENT FOR PUBLIC IMPROVEMENTS. Add the following paragraph. "The Parties hereby agree and affirm that previous agreements require the Developer to reimburse the City for certain public improvements that were made in anticipation of and to help foster full build out of the Project Area. The Parties acknowledge the following reimbursements required to be paid by the Developer to the Authority should the Developer fail to construct the remaining 145,778 square feet of shell retail space by the deadlines set forth in Section 4.4.3 herein:"

4.7.1 Reimbursement of I-35/UNP TIF Frontage Road Costs. Add the following sentence. "The Parties acknowledge that the Frontage Road and roadway connection to 24th Ave. NW has been completed and the reimbursement amount is set at \$2.4 million."

4.7.2 Legacy Park Construction Costs. In accordance with prior agreements, Developer shall reimburse the Authority \$5.9 million towards Legacy Park Construction Costs. The reduction in the reimbursement amount for Legacy Park Construction Costs for donation of Cultural Facility Land set forth in Section 4.7.2.a of Development Agreement No. 5 remains unchanged.

SECTION 4.8.1 OPENING OF LEGACY PARK. The Parties acknowledge that Legacy Park has been developed and opened to the public on September 17, 2015 which satisfies the development timeline specified in 4.8(a) of Development Agreement No. 5.

SECTION 4.8.2 DEADLINE TO DEVELOP CULTURAL FACILITY LAND. The Developer and the City agree that the City will have until June 30, 2026 to develop the Cultural Facility Land or the timeline specified in Section 4.8, whichever is longer. If the Cultural Facility Land is not developed within that timeframe, the City agrees to deed the Cultural Facility Land back to Developer at the same price for which it was obtained by the City.

SECTION 4.9.1 LIFESTYLE CENTER COSTS. The Parties recognize that the Project Plan provides for making available funding in an amount up to \$8.25 million for Lifestyle Center Costs to facilitate retail development. To qualify for consideration for any Lifestyle Center Costs, two of the three following criteria related to location and retail sales per square foot were required to be met: (1) The retail store must be one that does not currently exist in a 21 mile radius of the Increment District, (2) The retail store must demonstrate an anticipated minimum sales volume of not less than \$175 per square foot of its retail store (for stores larger

than 10,000 square foot) or not less than \$275 per square foot (for stores of 10,000 square feet or smaller), or (3) The retail store shall be relocated from outside the city limits of the City of Norman. The Parties agree that, to develop the Lifestyle Center with the goal of creating a regional draw, the sales per square foot targets should be adjusted to include the following criteria:

- a. The retail store associated with the Lifestyle Center Costs does not currently exist within Norman; and
- b. The retail store shall be able to demonstrate an anticipated minimum sales volume of no less than \$300 per square foot of its retail space (for stores larger than 10,000 square feet) or not less than \$400 per square foot of its retail space (for stores of 10,000 square feet or smaller); and
- c. Parcel development plan for retail store incorporates urban design elements of walkability, and connectivity.

SECTION 4.10. PROJECT AREA AMENITIES

SECTION 4.10.1 ROBINSON STREET ENTRANCE. A preliminary design for an entrance into the Project Area has been completed for the entrance at Robinson Street and 24th Avenue NW. An image of the design is attached as Exhibit B. The Parties agree that Final Design for the entrance will be completed by May 1, 2016, with bidding and construction to be completed by November 15, 2016.

SECTION 4.10.2 LIFESTYLE CENTER ENTRANCE. A preliminary design for an entrance into the planned Lifestyle Center at 24th Avenue NW and Legacy Park Drive has been completed and presented to the parties. In recognition of the likelihood that an anchor tenant for the Lifestyle Center will want input into the design of the entrance, the Parties agree that the entrance should not be constructed until the first anchor tenant has committed to locating in the Lifestyle Center, unless the Developer requests an accelerated construction schedule.

SECTION 4.10.3 COST SHARING ARRANGEMENT. The Parties agree to the following cost sharing arrangement for the Robinson Street Entrance and the Lifestyle Center Entrance.

- a. "Cost of the Entrances" shall include, but not be limited to design, design coordination, civil engineering, surveys, as-builts, geotech services, sight lighting and electrical design and installation services, permits, inspections, bonds, meters, construction, construction testing, construction administration, legal services, overhead and administration, development fees, landscape and irrigation installation.
- b. It is acknowledged an estimate of the Cost of the Entrances was provided by the Developer in 2013 through Goppold and Associates that reflected approximately \$837,000. Goppold and Associates will move forward with

final design and cost estimates for the Robinson Street Entrance in order that the Robinson Street Entrance can be let out for bid, said work to be completed not later than the Spring of 2016. The work of Goppold and Associates on the Robinson Street Entrance from the date of this Amendment to Development Agreement No. 5 will be compensated as a Cost of the Entrances expense upon proper invoice and supporting documentation accepted by the NTIFA. Recognizing material inflation costs, the parties agree to equally share in the actual Cost of the Entrances not to exceed \$900,000 (\$300,000 per contributor).

- c. The Developer will pay one-third of the total Cost of the Entrances. The Developer's contribution to a particular component of the Cost of the Entrances shall be paid over to the NTIFA based on the estimated cost of the component prior to the bid of that service. Once a particular component of the Cost of the Entrances has been completed and a final invoice has been received the NTIFA shall refund any excess amount not needed, hold the contribution to be applied to the next component, as requested by the Developer, or invoice the Developer for the additional cost not anticipated in the cost estimate, as the case may be.
- d. Business Improvement District funds that are not otherwise obligated to the maintenance of Legacy Park will be made available to pay one-third of the total Cost of the Entrances. Should adequate funds from the Business Improvement District not be available to pay their share of the Cost of the Entrances at the time the particular expenditure is being considered for bid, then Enhanced Landscaping funds shall be made available to cover this cost until such time as future Business Improvement District funds are collected to immediately reimburse the Enhanced Landscaping funds.
- e. Funding for Enhanced Landscaping, made available by the Project Plan and Development Agreement No. 3, will fund the remaining one-third of the total Cost of the Entrances.

Should it be estimated at any time that the Cost of the Entrances will exceed \$900,000, then the contributors shall confer to determine how to revise the project costs, or how to appropriately provide funding for the excess Cost of the Entrances prior to awarding a bid for the particular component that would result in the excess Cost of the Entrances.

SECTION 4.11. MASTER PLANNING OF UNDEVELOPED AREAS

SECTION 4.11.1 IDENTIFICATION OF UNP UNDEVELOPED AREAS.

- a. UNP Undeveloped land. The Parties recognize that approximately 97.79 acres north of Rock Creek Road in the UNP TIF District has been planned for development as follows: (i) NEDC – Office – 30 acres; (ii) NEDC – Light Industrial – 30 acres; (iii) Cornerstone – Multifamily residential – 30 acres; (iv) [Graves] – Office – 7.79 acres. Approximately 165 acres North of Rock Creek Road remains to be developed.

- b. UTC Undeveloped land. The Parties recognize that approximately 41.34 acres south of Rock Creek Road and east of 24th Avenue NW identified in previous planning efforts as the “Lifestyle Center” in the UNP TIF District has remained undeveloped.

SECTION 4.11.2. MASTER PLANNING OF UNP LAND. To determine a master plan strategy for the remaining acreage north of Rock Creek Road UNP shall move forward with its consultation with RTKL Associates Inc. (“RTKL”), to include the following tasks:

- a. Preparation of base map to include all previous and planned development on site;
- b. Analysis of data to develop a framework for development that locates key uses while providing for future flexibility based on market realities;
- c. Test fit a range of uses and densities appropriate for the Norman market incorporating concepts of walkability and urban design;
- d. Recommend optimal uses within the context of a larger plan that will provide an overall vision for University North Park.

SECTION 4.11.3. COST SHARING OF RTKL CONSULTATION. Costs for RTKL services are estimated to be forty thousand dollars (\$40,000). Services associated with property located north of Rock Creek Road is estimated to be twenty thousand dollars (\$20,000) all of which will be paid by UNP. Services associated with property located south of Rock Creek Road and the Lifestyle Center area in particular are estimated to be twenty thousand dollars (\$20,000) all of which will be paid by NTIFA at the conclusion of the work and after receiving the final report from the consultation

SECTION 4.11.4. MASTER PLANNING OF UTC LAND. To determine a development and recruitment strategy for the Lifestyle Center, NTIFA and UTC shall move forward with its consultation with Goppold Architecture, and to continue to work cooperatively with the NTIFA or a NTIFA funded consultant to include the following tasks:

- a. Consider potential anchor tenants in the Lifestyle Center after considering input from UTC representatives;
- b. Analysis of data and anchor information to develop a framework for development that locates key uses while providing for future flexibility based on market realities;
- c. Test fit a range of uses and densities appropriate for the Norman market incorporating concepts of walkability, urban design, and mixed use that will incorporate the Lifestyle Center development into Legacy Park, and the hotel complex immediately to the north of the Lifestyle Center area.

- d. Recommend optimal uses within the context of a larger plan that will provide an overall vision for Legacy Park, hotel complex, and Lifestyle Center as an entertainment district for University North Park.

SECTION 4.11.5. COST SHARING OF UTC CONSULTATION. UTC agrees to pay all costs and expenses reasonably incurred by Goppold Architecture to attend meetings with and to participate with NTIFA representatives or NTIFA consultants to receive input regarding the Master Planning of UTC Undeveloped land as described in Section 4.1.b.

SECTION 4.11.6. IMPLEMENTATION OF MASTER PLANNING EFFORTS. The Master Planning efforts outlined in this section are meant to be development tools to benefit planning for the overall development of the UNP TIF District. It is recognized by the parties that the development marketplace is dynamic in nature and that development decisions must be driven by overall economics of the development as dictated by the market. Participation in the Master Planning efforts shall not require that the recommendations be implemented by any party. External factors, including but not limited to, covenants filed of record, potential amendments to covenants, existing or future project financing arrangements, market forces, as well as potential public and private partnerships to further the Project Plan may impact implementation of the recommendations of the Master Plan.

IN WITNESS WHEREOF, the City, the Authority, UNP, the Developer, and the Purchaser, as Parties to this Agreement, have caused this Agreement to be duly executed and delivered as of the date first above written.

THE CITY OF NORMAN, OKLAHOMA

By: _____
Name: Cindy Rosenthal
Title: Mayor

By: _____
Name: Brenda Hall
Title: City Clerk
(SEAL)

NORMAN TAX INCREMENT FINANCE AUTHORITY

By: _____
Name: Cindy Rosenthal
Title: Chairman

By: _____
Name: Brenda Hall
Title: Secretary
(SEAL)

Approved as to form and legality this ____ day of _____, 2015.

City Attorney/ General Counsel

UNIVERSITY NORTH PARK, LLC

By: _____

Name: _____

Title: _____

UNP REALTY INVESTORS, LLC

By: _____

Name: _____

Title: _____

UNIVERSITY TOWN CENTER, LLC

By: _____

Name: _____

Title: _____

September 15, 2015

Mr. Guy Patton
President and CEO
100 Timberdell Road
Norman, OK 73019-0685

Subject: **University North Park Master Planning – North Parcels**

Mr. Patton,
RTKL Associates Inc. is pleased to present this proposal for planning services for the University North Park Master Plan in Norman, OK.

PROJECT UNDERSTANDING

RTKL understands that the goal of this effort is to determine a master plan strategy for the undeveloped portion of the University North Park site, roughly bound by Tecumseh Road to the north, West Robinson Street to the south, Westheimer Field to the east and Interstate 35 to the west. The following scope of services described below will focus upon the north parcels, located north of Rock Creek Road. This will be completed concurrent to a study of the southern parcels described in a separate scope of services. An important goal of this effort will be to develop a design strategy that incorporates existing development into a new master plan vision.

This effort will begin with the preparation of a base map that includes all previous and planned development on site. RTKL will analyze this data to develop an effective framework for development that locates key uses while providing for future flexibility based upon market realities. This framework, in turn, will provide the basis of our master planning efforts that will test fit a range of uses and densities appropriate for the Norman market. We understand that the purpose of this master plan will be to locate and organize these uses within the context of a larger plan that will provide an overall vision for University North Park.

PROJECT TEAM

Jeff Gunning – Vice President, Retail Strategies
Erich Dohrer – Principal, Lead Designer/Project Manager
Shelly Zhu – Designer, Planning Support

SCOPE OF SERVICES

PHASE ONE: PLANNING CHARRETTE

TASK 1.1: BASE MAPPING

Week One

RTKL, working with information provided by the client, will develop an overall base map that includes all existing and planned development on site. This should include all development, infrastructure, and open space. This base map will serve as the foundation for future planning efforts.

TASK 1.2: MASTER PLAN ALTERNATIVES

Two Weeks

RTKL will develop 2-3 master plan alternatives that express the potential development scenarios for the undeveloped portions of the site. A range of framework strategies, development uses and typologies, and densities will be explored. Each option will include the following:

Product:

- Illustrative Master Plan
- Transportation and Parking Plan
- Open Space Plan
- Programming Recommendation
- Development area tabulations
- Architectural Image Boards

TASK 1.3 EVALUATION OF ALTERNATIVES

RTKL will meet with the client to evaluate the relative merits of each concept and select the preferred option for further refinement. It is anticipated that some key elements, such as identity creation, infrastructure costs, development phasing, and traffic impacts may be the major distinguishing traits among the alternatives.

Product: One meeting with the client in Norman

PHASE TWO: CONCEPTUAL PLAN

TASK 2.1 CONCEPTUAL MASTER PLANNING

Two Weeks

RTKL will further develop the preferred option determined in the previous task that illustrate the ideas generated in the workshop, with an emphasis on market-based realities, goals and objectives, visions and preferences, etc. The Master Plan will reflect a range of development options and will include the following:

Product:

- Existing Conditions Diagrams
- 1 Illustrative Plan
- 1 Land Use Plan
- 1 Open Space Plan
- Development area tabulations
- Architectural Image Boards

TIME SCHEDULE FOR SERVICES

RTKL proposes to provide professional services in a period of 5 weeks. The RTKL Team will schedule appropriate dates to begin the workshop upon execution of the contract.

COMPENSATION FOR PROFESSIONAL SERVICES

RTKL will provide professional services on a lump sum basis of \$20,000. The client shall pay RTKL in accordance with Attachment A – Rate Table and Attachment B – Terms and Conditions

TRAVEL

All travel to and from Norman will be considered a reimbursable expense (described below).

ADDITIONAL SERVICES

RTKL shall seek compensation for any requested Additional Services not outlined in the Scope of this proposal, either on an hourly basis, determined in accordance with the attached rate schedule, or a mutually agreeable lump sum.

RTKL will provide general additional services when requested by the OU Foundation in writing, on an hourly basis in accordance with the attached Hourly Rate Table by Classification. An "Additional Services Authorization" will be forwarded to the Ownership Group by RTKL along with a proposal outline for the requested additional services. This authorization will be approved by the OU Foundation and returned prior to RTKL proceeding with the additional scope of work.

Services beyond the scope of Basic Services and, therefore, provided only as an Additional Service include – but are not limited to:

- Design and documentation services beyond the phases listed above;
- Design services for Environmental Graphic scopes beyond that listed above;
- Detailed Design Criteria Manual or Code;
- Site visits/Presentations/Workshops/Government Presentations in excess of quantity identified above;
- Services resulting from Owner requested changes outside the normal sequence of flow of project schedule;
- Services resulting from significant changes in design or documentation previously approved by the Client;
- Computer Animation Services;

REIMBURSABLE EXPENSES

Reimbursable Expenses are in addition to compensation for Basic and Additional Services and shall be billed at cost with a multiplier of 1.1. Reimbursable Expenses include expenses incurred by RTKL and RTKL consultants in the interest of the Project, including, but not limited to, the following:

1. Reproductions including but not limited to Project printing of plans and specifications, and other Project related photocopying and photographic production.
2. Travel related costs for all Project matters including but not limited to Project meetings and construction administration matters, such as air and ground travel at commercial rates, meals, automobile rental, overnight accommodations at a hotel/motel, tolls, parking, and mileage at the applicable IRS rate.
3. Telephone charges related to Project matters including amount and time of long distance telephone calls and long distance fax connection charges.
4. Delivery of all Project related matters including express/overnight mail, courier charges.

5. Project meetings, including provision of the meeting room and any sustenance offered.
6. Renderings, models, and Photography requested by the Owner.
7. Insurance including professional liability insurance when the Owner requests additional coverage, specialty endorsements, or limits in excess of that normally carried by RTKL and RTKL's consultant.
8. Legal fees of RTKL incurred in connection with review and revision of owners and lender's certifications, lien waivers, and similar documents presented to RTKL for execution or in connection with collection of amounts due to RTKL from the Owner.
9. Additional Expense over normal hourly rates for Overtime Work approved by Client in advance of the work being performed.
10. Other costs, not described in categories 1 through 9 above, when requested by the Owner in connection with the rendering of RTKL's services for the Project.

BILLING AND PAYMENT

RTKL's customary practice is to bill on a monthly basis for the work completed in the prior month. Fee invoices will be based on the percentage of work completed in the prior month. See Terms and Conditions for further specifics.

AGREEMENT

By executing and returning a copy of this letter, the OU Foundation agrees to the terms of this proposal and agrees to pay RTKL in accordance with the attached Terms and Conditions. Please contact us at your convenience with any questions you may have.

Kind regards,

RTKL Associates Inc.

Acknowledged and Agreed By:



Jeff Gunning, AIA
Senior Vice President

Date:

Attachments:

Attachment A: Professional Hourly Rate Schedule by Classification
Attachment B: Terms and Conditions

cc: Gunning, Dohrer, File

ATTACHMENT A

RATE SCHEDULE BY CLASSIFICATION

RTKL Associates Inc.

Effective May 2015

	Hourly Rate
Jr. Staff / Project Admin.	\$95.00
Designer	\$125.00
Senior Designer	\$150.00
Associate	\$180.00
Senior Associate	\$200.00
Associate Vice President	\$225.00
Senior Associate Vice President	\$250.00
Vice President	\$275.00
Senior Vice President	\$300.00
Executive Vice President	\$350.00

The above rates may include temporary personnel hired by RTKL on a contractual as needed basis.

Rates Subject to Annual Adjustment

ATTACHMENT B

TERMS AND CONDITIONS

RTKL Associates Inc. ("RTKL")

STANDARD OF CARE

RTKL shall perform its services consistent with the professional skill and care ordinarily provided by design professionals performing similar services as those of RTKL under this Agreement and practicing in the same or similar locality under the same or similar circumstances. RTKL shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

PAYMENT FOR SERVICES PROVIDED

Unless otherwise provided in this Agreement, compensation for Services and Expenses shall be due and payable within 30 days of invoice date. RTKL will invoice the Client on a monthly basis. Invoices over 45 days will be charged interest at the lesser of 1.5% per month or the maximum rate allowed by applicable law. If unpaid invoices become more than 45 days overdue, RTKL may, upon 7 days written notice to the Client, stop work until payment is received. In the event of non-payment, Client shall reimburse RTKL for any attorney fees incurred to collect the unpaid receivables.

RTKL INSURANCE

RTKL will maintain commercial general liability, automobile liability, workers compensation and employee liability insurance reasonably necessary in connection with RTKL's performance of its services, and professional liability insurance with a coverage limit of not less than \$2 million per claim and annual aggregate while providing services for this Project and for three years thereafter.

LIMITATION OF LIABILITY; WAIVER OF CONSEQUENTIAL DAMAGES

RTKL's total liability to the Client for damages related to this Project shall not exceed RTKL's total fees for this Project or the annual aggregate limit of professional liability insurance RTKL is required to carry by these Terms and Conditions, whichever is greater.

RTKL and Client mutually waive all consequential damages arising out of the Project. This mutual waiver includes, but is not limited to, (i) damages incurred by the Owner for rental expense, liquidated damages, and loss of use income, profit and business, and (ii) damages incurred by RTKL for overhead and compensation of employees, loss of business and reputation, and loss of profit.

INDEMNIFICATION

Each party agrees, to the fullest extent permitted by law, to indemnify and hold harmless the other party and its officers, directors and employees, against all damages, liabilities or costs, including reasonable attorneys' fees and other legal costs, to the extent caused by the indemnifying party's negligent acts, errors or omissions and those of its consultants or anyone for whom it is legally liable. The parties expressly agree that this indemnity provision does not include, and in no event shall either party be required to assume, under this indemnity provision or otherwise, any obligation or duty to defend the other against any claims, causes of action, demands, or lawsuits in connection with matters encompassed by this indemnity provision.

CERTIFICATES

RTKL shall execute certificates, and consents reasonably required to facilitate assignment to a lender, provided such do not require knowledge, services or responsibilities beyond the scope of this Agreement or which would result in RTKL assuming risks or liabilities beyond those otherwise assumed by RTKL under this Agreement.

USE OF RTKL'S DOCUMENTS

Documents prepared by RTKL for this Project are intended for use solely with respect to this Project and RTKL shall retain all rights, including ownership and copyright. Provided Client remains current in its payment obligations to RTKL, Client is granted a non-exclusive license to use, copy and reproduce documents in connection with the construction, repair, maintenance, use and occupancy of, and publicity for, this Project. Other uses shall be negotiated separately. RTKL reserves the right to photograph the Project and to be identified as designers of the Project in all Project marketing materials.

ELECTRONIC FILES

Client authorizes RTKL to distribute electronic files of Project to constructors and designers related directly to Project at RTKL's normal fees for such distribution.

CLAIMS AND DISPUTES

Any claim, dispute or other matter in question arising out of or related to this Agreement or Project shall be subject to non-binding mediation as a condition precedent to binding dispute resolution.

ADDITIONAL SERVICES

RTKL and its consultants will provide additional services when requested by the Client on a Lump Sum basis as mutually agreed by the Client and RTKL or, in the absence thereof, on an hourly basis, either according to the Hourly Rate Schedule included in this Agreement or, in the absence thereof, at RTKL's then current standard hourly billing rates. Directed changes to items previously approved will be considered Additional Services.

NON-DISCRIMINATION AND OTHER CLIENT REQUIREMENTS

RTKL shall comply with all applicable anti-discrimination and equal employment laws and regulations and shall provide any necessary certificates to evidence such compliance.

MISCELLANEOUS

RTKL has no responsibility (1) for detection or removal of hazardous substances; (2) for construction site safety and means and methods of construction used by the contractor; (3) to provide any service not approved by RTKL and set forth in writing. RTKL shall be entitled to rely upon the accuracy and completeness of all information provided by the Client. This Agreement is the entire agreement between the Client and RTKL and supersedes all prior negotiations, proposals and agreements. Nothing in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or RTKL. The law of the Project location governs this Agreement.

RTKL shall not be required to sign and/or stamp construction documents or permit sets, or provide the Client with RTKL's final deliverables, until RTKL has received the Client's written acceptance of RTKL's proposal, of which these Terms and Conditions are a part, or the parties have executed another form of agreement in lieu of such proposal.

The Client shall coordinate RTKL's duties and responsibilities set forth in the contract for construction with RTKL's services set forth in these Terms and Conditions. The Client shall provide RTKL a copy of the executed agreement between the Client and contractor.

ASSIGNMENT

Neither RTKL nor Client shall assign this agreement without written consent of the other party, not to be unreasonably withheld. Notwithstanding the foregoing, RTKL has the right to assign this agreement to an affiliate of RTKL without the consent of the Client.

TERMINATION AND SUSPENSION

Either party may terminate this Agreement at any time with or without cause by written notice. Termination shall be effective 7 days after date of notice. Upon termination, all invoices presented by RTKL for Services and Expenses for periods prior to the date of termination shall become immediately due and payable. Failure of Client to make payments to RTKL under this Agreement shall be cause for suspension and termination. In the event of a suspension of Services, RTKL shall have no liability for any damages to Client incurred because of such suspension.

If the Client suspends the Project, RTKL shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, RTKL shall be compensated for expenses incurred in the interruption and resumption of RTKL's services. RTKL's fees for the remaining services and the time schedules shall be equitably adjusted. If the Client suspends the Project for more than 90 cumulative days for reasons other than the fault of RTKL, RTKL may terminate this Agreement by giving not less than seven days' written notice.

If the services covered by this Agreement have not been completed within twelve (12) months of the date hereof, through no fault of RTKL, extension of RTKL's services beyond that time shall be considered an additional service.

END OF TERMS AND CONDITIONS



AN ARCADIS COMPANY

RTKL Associates Inc.

901 South Bond Street
Baltimore, MD 21231

☎ 410 537 6000

RTKL.COM

October 05, 2015

Ms. Susan Connors
City Planning and Community Development Director
City of Norman
P.O. Box 370
201-A West Gray
Norman, OK 73070
405-366-5431

Subject: University North Park Master Planning – South Parcels

Ms. Connors,
RTKL Associates Inc. is pleased to present this proposal for planning services for the University North Park Master Plan in Norman, OK.

PROJECT UNDERSTANDING

RTKL understands that the goal of this effort is to determine a master plan strategy for the undeveloped portion of the University North Park site, roughly bound by Tecumseh Road to the north, West Robinson Street to the south, Westheimer Field to the east and Interstate 35 to the west. The following scope of services described below will focus upon the south parcels, located south of Rock Creek Road. This will be completed concurrent to a study of the northern parcels described in a separate scope of services. An important goal of this effort will be to develop a design strategy that incorporates existing development into a new master plan vision.

We understand that Goppold Architecture will be developing concepts for the lifestyle center. RTKL will coordinate with Goppold Architecture to incorporate their design strategies into the overall vision.

This effort will begin with the preparation of a base map that includes all previous and planned development on site. RTKL will analyze this data to develop an effective framework for development that locates key uses while providing for future flexibility based upon market realities. This framework, in turn, will provide the basis of our master planning efforts that will test fit a range of uses and densities appropriate for the Norman market. We understand that the purpose of this master plan will be to locate and organize these uses within the context of a larger plan that will provide an overall vision for University North Park.

PROJECT TEAM

Jeff Gunning – Vice President, Retail Strategies
Erich Dohrer – Principal, Lead Designer/Project Manager
Shelly Zhu – Designer, Planning Support

SCOPE OF SERVICES

PHASE ONE: PLANNING CHARRETTE

TASK 1.1: IDENTIFICATION OF UNP UNDEVELOPED AREAS

Week One

RTKL, working with information provided by the client, will develop an overall base map that includes all existing and planned development on site. This should include all development, infrastructure, and open space. This base map will serve as the foundation for future planning efforts.

Product:

- Base map to include all previous and planned developments on site

TASK 1.2: MASTER PLANNING OF UNP LAND

Two Weeks

RTKL will develop 2-3 master plan alternatives that express the potential development scenarios for the undeveloped portions of the site. A range of framework strategies, development uses and typologies, and densities will be explored. Tasks for each master plan will include:

- Analysis of data to develop a framework for development that locates key uses while providing for future flexibility based on market realities;
- Test fit a range of uses and densities appropriate for the Norman market incorporating concepts of walkability and design;
- Recommendations for optimal uses within the context of a larger plan that will provide an overall vision for the development.

Each option will include the following:

Product:

- Illustrative Master Plan
- Transportation and Parking Plan
- Open Space Plan
- Programming Recommendation
- Development area tabulations
- Architectural Image Boards

TASK 1.3 EVALUATION OF ALTERNATIVES

RTKL will meet with the client to evaluate the relative merits of each concept and select the preferred option for further refinement. It is anticipated that some key elements, such as identity creation, infrastructure costs, development phasing, and traffic impacts may be the major distinguishing traits among the alternatives.

Product: One meeting with the client in Norman

PHASE TWO: CONCEPTUAL PLAN

TASK 2.1 CONCEPTUAL MASTER PLANNING

Two Weeks

RTKL will further develop the preferred option determined in the previous task that illustrate the ideas generated in the workshop, with an emphasis on market-based realities, goals and objectives, visions and preferences, etc. The Master Plan will reflect a range of development options and will include the following:

Product:

- Existing Conditions Diagrams
- 1 Illustrative Plan
- 1 Land Use Plan
- 1 Open Space Plan
- Development area tabulations
- Architectural Image Boards

TIME SCHEDULE FOR SERVICES

RTKL proposes to provide professional services in a period of 5 weeks. The RTKL Team will schedule appropriate dates to begin the workshop upon execution of the contract.

COMPENSATION FOR PROFESSIONAL SERVICES

RTKL will provide professional services on a lump sum basis of \$20,000. The client shall pay RTKL in accordance with Attachment A – Rate Table and Attachment B – Terms and Conditions.

TRAVEL

All travel to and from Norman will be considered a reimbursable expense (described below).

ADDITIONAL SERVICES

RTKL shall seek compensation for any requested Additional Services not outlined in the Scope of this proposal, either on an hourly basis, determined in accordance with the attached rate schedule, or a mutually agreeable lump sum.

RTKL will provide general additional services when requested by the Ownership Group in writing, on an hourly basis in accordance with the attached Hourly Rate Table by Classification. An “Additional Services Authorization” will be forwarded to the Ownership Group by RTKL along with a proposal outline for the requested additional services. This authorization will be approved by the City of Norman and returned prior to RTKL proceeding with the additional scope of work.

Services beyond the scope of Basic Services and, therefore, provided only as an Additional Service include – but are not limited to:

- Design and documentation services beyond the phases listed above;
- Design services for Environmental Graphic scopes beyond that listed above;

- Detailed Design Criteria Manual or Code;
- Site visits/Presentations/Workshops/Government Presentations in excess of quantity identified above;
- Services resulting from Owner requested changes outside the normal sequence of flow of project schedule;
- Services resulting from significant changes in design or documentation previously approved by the Client;
- Computer Animation Services;

REIMBURSABLE EXPENSES

Reimbursable Expenses are in addition to compensation for Basic and Additional Services and shall be billed at cost with a multiplier of 1.1. Reimbursable Expenses include expenses incurred by RTKL and RTKL consultants in the interest of the Project, including, but not limited to, the following:

1. Reproductions including but not limited to Project printing of plans and specifications, and other Project related photocopying and photographic production.
2. Travel related costs for all Project matters including but not limited to Project meetings and construction administration matters, such as air and ground travel at commercial rates, meals, automobile rental, overnight accommodations at a hotel/motel, tolls, parking, and mileage at the applicable IRS rate.
3. Telephone charges related to Project matters including amount and time of long distance telephone calls and long distance fax connection charges.
4. Delivery of all Project related matters including express/overnight mail, courier charges.
5. Project meetings, including provision of the meeting room and any sustenance offered.
6. Renderings, models, and Photography requested by the Owner.
7. Insurance including professional liability insurance when the Owner requests additional coverage, specialty endorsements, or limits in excess of that normally carried by RTKL and RTKL's consultant.
8. Legal fees of RTKL incurred in connection with review and revision of owners and lender's certifications, lien waivers, and similar documents presented to RTKL for execution or in connection with collection of amounts due to RTKL from the Owner.
9. Additional Expense over normal hourly rates for Overtime Work approved by Client in advance of the work being performed.
10. Other costs, not described in categories 1 through 9 above, when requested by the Owner in connection with the rendering of RTKL's services for the Project.

BILLING AND PAYMENT

RTKL's customary practice is to bill on a monthly basis for the work completed in the prior month. Fee invoices will be based on the percentage of work completed in the prior month. See Terms and Conditions for further specifics.

AGREEMENT

By executing and returning a copy of this letter, the City of Norman agrees to the terms of this proposal and agrees to pay RTKL in accordance with the attached Terms and Conditions. Please contact us at your convenience with any questions you may have.

Kind regards,

RTKL Associates Inc.

Acknowledged and Agreed By:



Jeff Gunning, AIA
Senior Vice President

Date:

Attachments:

Attachment A: Professional Hourly Rate Schedule by Classification

Attachment B: Terms and Conditions

cc: Gunning, Dohrer, File

ATTACHMENT A

RATE SCHEDULE BY CLASSIFICATION

RTKL Associates Inc.

Effective May 2015

	Hourly Rate
Jr. Staff / Project Admin.	\$95.00
Designer	\$125.00
Senior Designer	\$150.00
Associate	\$180.00
Senior Associate	\$200.00
Associate Vice President	\$225.00
Senior Associate Vice President	\$250.00
Vice President	\$275.00
Senior Vice President	\$300.00
Executive Vice President	\$350.00

The above rates may include temporary personnel hired by RTKL on a contractual as needed basis.

Rates Subject to Annual Adjustment

ATTACHMENT B

TERMS AND CONDITIONS

RTKL Associates Inc. ("RTKL")

STANDARD OF CARE

RTKL shall perform its services consistent with the professional skill and care ordinarily provided by design professionals performing similar services as those of RTKL under this Agreement and practicing in the same or similar locality under the same or similar circumstances. RTKL shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

PAYMENT FOR SERVICES PROVIDED

Unless otherwise provided in this Agreement, compensation for Services and Expenses shall be due and payable within 30 days of invoice date. RTKL will invoice the Client on a monthly basis. Invoices over 45 days will be charged interest at the lesser of 1.5% per month or the maximum rate allowed by applicable law. If unpaid invoices become more than 45 days overdue, RTKL may, upon 7 days written notice to the Client, stop work until payment is received. In the event of non-payment, Client shall reimburse RTKL for any attorney fees incurred to collect the unpaid receivables.

RTKL INSURANCE

RTKL will maintain commercial general liability, automobile liability, workers compensation and employee liability insurance reasonably necessary in connection with RTKL's performance of its services, and professional liability insurance with a coverage limit of not less than \$2 million per claim and annual aggregate while providing services for this Project and for three years thereafter.

LIMITATION OF LIABILITY; WAIVER OF CONSEQUENTIAL DAMAGES

RTKL's total liability to the Client for damages related to this Project shall not exceed RTKL's total fees for this Project or the annual aggregate limit of professional liability insurance RTKL is required to carry by these Terms and Conditions, whichever is greater.

RTKL and Client mutually waive all consequential damages arising out of the Project. This mutual waiver includes, but is not limited to, (i) damages incurred by the Owner for rental expense, liquidated damages, and loss of use income, profit and business, and (ii) damages incurred by RTKL for overhead and compensation of employees, loss of business and reputation, and loss of profit.

INDEMNIFICATION

Each party agrees, to the fullest extent permitted by law, to indemnify and hold harmless the other party and its officers, directors and employees, against all damages, liabilities or costs, including reasonable attorneys' fees and other legal costs, to the extent caused by the indemnifying party's negligent acts, errors or omissions and those of its consultants or anyone for whom it is legally liable. The parties expressly agree that this indemnity provision does not include, and in no event shall either party be required to assume, under this indemnity provision or otherwise, any obligation or duty to defend the other against any claims, causes of action, demands, or lawsuits in connection with matters encompassed by this indemnity provision.

CERTIFICATES

RTKL shall execute certificates, and consents reasonably required to facilitate assignment to a lender, provided such do not require knowledge, services or responsibilities beyond the scope of this Agreement or which would result in RTKL assuming risks or liabilities beyond those otherwise assumed by RTKL under this Agreement.

USE OF RTKL'S DOCUMENTS

Documents prepared by RTKL for this Project are intended for use solely with respect to this Project and RTKL shall retain all rights, including ownership and copyright. Provided Client remains current in its payment obligations to RTKL, Client is granted a non-exclusive license to use, copy and reproduce documents in connection with the construction, repair, maintenance, use and occupancy of, and publicity for, this Project. Other uses shall be negotiated separately. RTKL reserves the right to photograph the Project and to be identified as designers of the Project in all Project marketing materials.

ELECTRONIC FILES

Client authorizes RTKL to distribute electronic files of Project to constructors and designers related directly to Project at RTKL's normal fees for such distribution.

CLAIMS AND DISPUTES

Any claim, dispute or other matter in question arising out of or related to this Agreement or Project shall be subject to non-binding mediation as a condition precedent to binding dispute resolution.

ADDITIONAL SERVICES

RTKL and its consultants will provide additional services when requested by the Client on a Lump Sum basis as mutually agreed by the Client and RTKL or, in the absence thereof, on an hourly basis, either according to the Hourly Rate Schedule included in this Agreement or, in the absence thereof, at RTKL's then current standard hourly billing rates. Directed changes to items previously approved will be considered Additional Services.

NON-DISCRIMINATION AND OTHER CLIENT REQUIREMENTS

RTKL shall comply with all applicable anti-discrimination and equal employment laws and regulations and shall provide any necessary certificates to evidence such compliance.

MISCELLANEOUS

RTKL has no responsibility (1) for detection or removal of hazardous substances; (2) for construction site safety and means and methods of construction used by the contractor; (3) to provide any service not approved by RTKL and set forth in writing. RTKL shall be entitled to rely upon the accuracy and completeness of all information provided by the Client. This Agreement is the entire agreement between the Client and RTKL and supersedes all prior negotiations, proposals and agreements. Nothing in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Client or RTKL. The law of the Project location governs this Agreement.

RTKL shall not be required to sign and/or stamp construction documents or permit sets, or provide the Client with RTKL's final deliverables, until RTKL has received the Client's written acceptance of RTKL's proposal, of which these Terms and Conditions are a part, or the parties have executed another form of agreement in lieu of such proposal.

The Client shall coordinate RTKL's duties and responsibilities set forth in the contract for construction with RTKL's services set forth in these Terms and Conditions. The Client shall provide RTKL a copy of the executed agreement between the Client and contractor.

ASSIGNMENT

Neither RTKL nor Client shall assign this agreement without written consent of the other party, not to be unreasonably withheld. Notwithstanding the foregoing, RTKL has the right to assign this agreement to an affiliate of RTKL without the consent of the Client.

TERMINATION AND SUSPENSION

Either party may terminate this Agreement at any time with or without cause by written notice. Termination shall be effective 7 days after date of notice. Upon termination, all invoices presented by RTKL for Services and Expenses for periods prior to the date of termination shall become immediately due and payable. Failure of Client to make payments to RTKL under this Agreement shall be cause for suspension and termination. In the event of a suspension of Services, RTKL shall have no liability for any damages to Client incurred because of such suspension.

If the Client suspends the Project, RTKL shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, RTKL shall be compensated for expenses incurred in the interruption and resumption of RTKL's services. RTKL's fees for the remaining services and the time schedules shall be equitably adjusted. If the Client suspends the Project for more than 90 cumulative days for reasons other than the fault of RTKL, RTKL may terminate this Agreement by giving not less than seven days' written notice.

If the services covered by this Agreement have not been completed within twelve (12) months of the date hereof, through no fault of RTKL, extension of RTKL's services beyond that time shall be considered an additional service.

END OF TERMS AND CONDITIONS